

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

SKILLFUL DAVIS,

Petitioner,

Civil No. 07-901-ST

v.

ORDER

BRIAN BELLEQUE,

Respondent.

HAGGERTY, District Judge:

Magistrate Judge Stewart issued a Findings and Recommendation [63] in this action recommending that Petitioner's Amended Petition for Writ of Habeas Corpus [58] should be denied, and that Judgment should be entered dismissing this case with prejudice. Petitioner has filed objections.

When a party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

The court has carefully evaluated the Magistrate Judge's Findings and Recommendations, petitioner's objections, and the record of the case. The Findings and Recommendation is well-reasoned, without error, and adopted.

DISCUSSION

The Magistrate Judge thoroughly reviewed that facts presented in this matter, and the Findings and Recommendation's background facts are adopted. Petitioner's Objections focused upon the Magistrate Judge's conclusion that the "Ninth Circuit has concluded that a habeas corpus petitioner cannot prevail on an ineffective assistance of counsel claim arising out of a noncapital sentencing proceeding because there is no clearly established federal law on point." Findings and Recommendation at 5 (citing *Moses v. Payne*, 555 F.3d 742, 754-55 (9th Cir. 2009) (where no Supreme Court decision squarely addresses an issue, § 2254(d)(1) bars relief); *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir. 2006); *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1244 (9th Cir. 2004).

The Magistrate Judge also recommended in the alternative that "[e]ven assuming that the Supreme Court's traditional test for ineffective assistance of counsel as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to non-capital sentencing proceedings, petitioner would not be entitled to relief in this case [because the post-conviction relief, or PCR] court specifically determined that petitioner's sentence was legal." Findings and Recommendation at 6 (internal quotation and citation omitted).

Petitioner contends that the PCR court's finding that the conviction was legal can be reviewed because the finding is contrary to clearly established law. Objections at 3 (citing 28 U.S.C. § 2254(d)(1)). Petitioner acknowledged the Ninth Circuit's ruling relied upon by the Magistrate Judge, *Davis v. Grigas*, concludes otherwise, but petitioner asserts that this court should recognize a clearly established federal law extending *Strickland* to non-capital sentencing

as a result of rulings issued subsequent to *Davis v. Grigas*, and because it should be "unarguable that criminal defendants have a clearly established right to effective representation of counsel during all critical stages of a criminal proceeding and that sentencing is a critical stage."

Objections at 6-7 (citations omitted).

Petitioner's Objections have been considered and are overruled. The Findings and Recommendation's conclusions are sound: a habeas corpus petitioner cannot prevail on an ineffective assistance of counsel claim arising out of a non-capital sentencing proceeding because there is no clearly established federal law on point. Moreover, even assuming to the contrary, the petitioner would still be precluded from relief because the PCR court specifically determined that petitioner's sentence was legal. The state court's determination that petitioner's sentence was proper under Oregon state law is not subject to review by this court. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

CONCLUSION

The Magistrate Judge's Findings and Recommendation[63] in this action recommending denial of Petitioner's Amended Petition for Writ of Habeas Corpus [58] is ADOPTED. This court also adopts the Magistrate Judge's recommendation to decline to issue a Certificate of Appealability, on the basis that petitioner Skillful Davis has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

Dated this 13 day of October, 2010.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge